in petitioner's brief is a fair and truthful short statement of the inference to be drawn from the answer of petitioner.

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said high school building and devote the same to high school purposes for said Slab Fork District; that the establishment and construction of such said high school building on said lands and the maintenance of such high school therein and thereon, together with the reversionary clause in said deed contained, was in fact the motivating cause and only consideration for the execution of said deed of conveyance, and this respondent is advised and upon such information alleges the fact to be, that the design and plan of said building had theretofore then been made and both the grantor and the grantee to said deed of conveyance were then, and before the execution and delivery of said deed, cognizant of the kind and character of building contemplated and intended to be built and constructed thereon, as well as the uses and purposes to which the same was to be devoted; that it was, at the date of the execution of said deed, the intent, spirit and purpose of both the grantor and the grantee to use said lands for such said high school for the constituents of said Board of Education, and this respondent is advised and upon such information alleges the fact to be, that the maintenance and use of said building was the free school purposes referred to and contemplated by the language used in said deed of the 23rd day of August, 1924, and described in Paragraph 1 hereof."

THE ERRONEOUS AND DECEPTIVE CONSTRUCTION PLACED ON THE DEED OF AUGUST 15, 1929,—WINDING GULF COLLIERY COMPANY TO WINDING GULF COLLIERIES.

Under the same heading of "UNWARRANTED STATEMENTS IN PETITION," respondent quotes from pages 7 and 8 of our petition for certiorari:

> "The petition (P. 7-8) also states:
>
> 'Winding Gulf Collieries, by deed dated the 15th day of August, 1929, succeeded to the rights of Winding Gulf Colliery Company (R. 124).'
>
> The foregoing statement is not correct because the record (54) shows that Winding Gulf Colliery Company, predecessor in title to Winding Gulf Collieries, the petitioner, excepted from said conveyance all the property, rights and privileges granted to this respondent's predecessor by deed dated August 23, 1924. *This exception was the land on which the school building was located and which was destroyed by fire and covered by the insurance in question in this case.*" (Emphasis ours).

The emphasized part of the foregoing statement is a demonstrable false construction of the deed referred to, as we shall show from the provisions of the deed itself. It is, undoubtedly, the purpose and intention of the foregoing emphasized language, to leave the inference that the deed of August 15, 1929, excepted and reserved to petitioner's predecessor in title the reversionary interest under which the petitioner claims in this proceeding. If there could be any doubt of this, they make their intention clear on page 18 of their brief, in this language:

> "(1) The interest which the petitioner claims in the reversion is not the petitioner's interest. It

is the interest of the petitioner's vendor, Winding Gulf Colliery Company (54)."

These erroneous statements and conclusions are further aided by the garbled excerpts quoted from the deed of August 15, 1929, on page 6 of respondent's brief. These statements, together with this garbled excerpt, present, as we think, a state of facts completely at variance and irreconcilable with the facts as disclosed by that deed itself. Other material provisions of that deed, indeed the provisions of the whole instrument, are too clear to require construction to demonstrate the false inference urged upon the Court. We deem it most misleading and unfair to the Court to leave the truth of these statements unchallenged. The most material provisions of the deed, bearing on the question, are reproduced below.[1] How any one, in the face

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[1] In this deed Winding Gulf Colliery Company is designated party of the first part, and Winding Gulf Collieries, as party of the second part.

The pertinent provision in the recitals contained in the deed, are:

"WHEREAS, the party of the second part has purchased for the consideration hereinafter mentioned *all of the property and property rights of every kind and character owned by the said party of the first part, or to which it is, or may be entitled,* and" (Emphasis ours).

GRANTING CLAUSE:

"NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES and in consideration of the Sum of One Dollar (1.00) paid in cash, as well as other consideration of value, the receipt of all of which is hereby acknowledged, the said Winding Gulf Colliery Company, a corporation, party of the first part doth hereby grant, bargain, sell, convey,

of the recitals, the granting clause and the habendum clause, of that deed, can urge upon this Court such reckless

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set-over, transfer, assign and deliver unto Winding Gulf Collieries, a Corporation, party of the second part, *all of its right, title, interest and estate in and to all of the property, property rights and effects of said party of the first part of every kind and character whatsoever, excepting only that received by the said party of the first part from the party of the second part in consideration for this conveyance, as aforesaid,* and including all of its lands, rights, lease-holds, easements, rights of way, plants, equipment, stocks of goods, supplies, live stock, accounts receivable, bills receivable, securities, investments, money, claims, demands, and choses, without regard to where the said property may be situate, *or the extent or character of the interest of said party of the first part therein;* it being expressly understood that the aforesaid grant of property hereinabove mentioned includes all of the lands and leaseholds, and rights and easements in and over lands, situate in Slab Fork District of Raleigh County, West Virginia, together with the coal mining operations thereon *and all buildings, structures, improvements, equipment* and appliances erected, installed or placed thereon, which said lands, leaseholds, rights and easements were conveyed to the said party of the first part by the deeds and writings hereinafter mentioned, to which reference is here made for further and more particular description and identification of the said property, to-wit." (Emphasis ours).

* * * * * * *

(Here follows the description of 54 grants of property conveyed by the deed, which includes the land on which the school building was erected).

THE HABENDUM CLAUSE:

"TO HAVE AND TO HOLD all of the aforesaid

and unwarranted statements of fact, is beyond our comprehension, and, we think, discloses a willingness and desire to win a law suit by such means as may appear to be necessary.

Furthermore, on page 6 of respondent's brief, undoubtedly to further impress the above erroneous view upon the Court, speaking of the deed of August 23, 1924, Winding Gulf Colliery Company to The Board of Education, they say: "Said deed provided that the tract of land conveyed as aforesaid would revert to the grantor, Winding Gulf Colliery Company *and not the petitioner,* upon cessation of use thereof by respondent for school purposes." (Emphasis ours). This statement is in direct and irreconcilable conflict with the reversionary clause, which expressly says, it shall revert not only to Winding Gulf Colliery Company but to "its successors or assigns in fee simple, with like force and to the same effect as if this conveyance had never been made."[5]

Furthermore, how these contentions, presented in re-

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property, rights, privileges and easements of every kind as hereinabove mentioned and set forth, *together with all other property of every kind and character now owned by said Winding Gulf Colliery Company or to which the said Winding Gulf Colliery Company is, or may become entitled, together with all rights, privileges and appurtenances thereunto belonging or in anywise appertaining, but subject* to all of the terms, provisions, covenants, conditions and limitations in the above recited instruments contained; unto the said party of the second part, its successors and assigns forever." (Emphasis ours).

[5]The whole reversionary clause contained in the deed of August 23, 1924, is as follows:

"It is further distinctly understood and agreed by and between the parties hereto as a part of the

spondent's brief in opposition to the petition, on the matter of petitioner's succession to the rights of Winding Gulf Colliery Company, can be made in good faith, in the face of their own answer filed in the District Court, (R. 14) is indeed difficult for us to understand. The third paragraph of that answer expressly says: "That defendant, Winding Gulf Collieries, a corporation, *is the legal successor* of Winding Gulf Colliery Company, a corporation." (Emphasis ours). Such a lack of candor and fairness to the Court is seldom found in a solemn pleading, brief or argument. If Winding Gulf Collieries was the legal successor to Winding Gulf Colliery Company when the answer was filed, will it not be so when this brief was written? Can a litigant thus "blow hot and cold" with facts, on which he seeks a determination of his case? Has not the respondent, by thus urging upon the Court such inconsistencies, constructed his own petard, the explosion of which demands very careful scrutiny of his protestations in general?

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consideration for this conveyance, that the property hereby conveyed is for public free school purposes only and for no other purpose or purposes and that the same and no part thereof shall at any time be used for any other purpose or purposes whatsoever and that whenever the said property hereby conveyed shall cease to be used for public free school purposes, *the same and every part thereof shall thereupon ipso facto revert to and become reinvested in, the said party of the first part, its successors or assigns in fee simple, with like force and to the same effect as if this conveyance had never been made;"* (Emphasis ours).

FURTHER OBSERVATIONS ON STATUTORY FORM OF FIRE INSURANCE POLICY.

In respondent's opposition brief, at page 8, under the title "ARGUMENT," they quote the sole ownership paragraph of the standard form of policy, and then follow this quotation with the statement, "The Supreme Court of Appeals of West Virginia has decided a number of times that this clause may be waived by the insurer." If it is the intention, by the foregoing language, to say that the sole ownership clause of the standard statutory form can be waived, other than as provided by the statute, we join issue on the statement. The statute itself provides for a waiver of the standard form, but to effect such a waiver, as authorized by the statute, it must be "provided by agreement in writing" as required by the statute and added to the policy. Furthermore, by the next section of the statute, (Section 8, of Article 4, of Chapter 33 of the West Virginia Code, see Appendix to our original brief, p. 51) the instances of waiver are enumerated and limited and "no other or different provision, agreement or condition" of waiver than those enumerated in this section of the statute, are permissible, and even in those cases the statute requires that "no such agreement or rider shall be inconsistent with or waive any of the conditions and provisions of the standard fire insurance policy hereby established." We have no quarrel with the cases cited in support of the statement, on page 9 of respondent's brief, these cases do not sustain the subtle inference which we think was intended to be drawn from the unqualified broad statement, "The Supreme Court of Appeals of West Virginia has decided a number of times that this clause may be waived by the insurer." None of these cases would sustain an action, on the instant insurance contract, by The Board of Education, if the words,

"for account of whom it may concern," were omitted from the face of the instant policy. This, undoubtedly, was the inference sought to be made from the language used in the brief. We invite an inspection of these cases, they disclose a determined and tenacious disposition on the part of the Court to enforce the statute and deny waiver of the provisions of the statute, except in the manner and as provided by the statute. In each of the cases cited, where there was no stipulation in writing, consistent with the provisions of the statute, recovery was denied, except in the single case of Hawkins v. Southwestern Mutual Insurance Company, and that case was decided on principles of estoppel; the conduct of the insurance company was such, that to permit the company to invoke the statute, would, by its own wrongful act, perpetrate a fraud on the insured.

We would, perhaps, have been less critical of the foregoing statement, had not the respondent, in the very next paragraph, reached in, so to speak, the very middle, not only of a paragraph, but in the middle of a sentence, and that without asterisks or any other insignia indicating deletion, to take a garbled excerpt from the opinion of the Melton case for a quotation.[6] The pertinent statement, without deletion, in the paragraph from which the quotation was taken, is as follows:

> "* * * The form of the policy issued to the insured is that prescribed by law. The public has a

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[6] Melton v. Aetna Insurance Co., 110 W. Va. 73, 157 S. E. 33.

"* * * The law does not preclude one having less than a fee simple title to land or one having a building even on leased premises from obtaining insurance; but it requires that the insured put the company on notice in such instances."

> keen interest in the enforcement of insurance contracts, because of the rates it must pay for fire protection and because of the risk to life and property it must undergo when fires occur; and as an expression of that interest the legislature has provided a standard uniform policy for all fire insurance in this state, one provision of which is the requirement that a building be situate upon land owned in fee simple by the insured, unless it be provided otherwise by agreement in writing added or endorsed on the policy. * * *"

This case certainly does not afford any comfort to the respondent. The provisions and requirements of the statute could not have been more clearly stated than in the above quotation. We are not unmindful of the further statement in that same paragraph, embodied in the quotation in respondent's brief, wherein it says:

This statement in this paragraph is pure obiter dictum. There was no such case under discussion or to be decided, though respondent makes much of this part of the quotation and emphasizes the same. Certainly the Court did not, by the interpolation of this language in this paragraph, intend to imply that one insuring property on a lease, or other estate, less than fee, could make his policy valid simply by putting the company on notice. In such instances it takes more than mere notice; the statute requires "agreement in writing thereon or by rider attached thereto" to insure less than the sole and unconditional ownership. The Court in using the word "notice" undoubtedly meant "notice" by "agreement in writing" thereon or by "rider attached thereto," defining the interest or interests to be insured, or as stated in the statute, "the extent of the application of the insurance under the policy." We do not question that one having less than the fee title can have insurance, but we do assert that in such instances, under

this statute, it must be stipulated in writing, as it was in the instant case (a) to insure the whole title and every person having interest therein, by use of the words "for account of whom it may concern" or other equivalent words or language, or (b) insure only the interest of the named assured, as was done in another case cited by respondent, of Commercial Union Assurance Co. v. Jass, 36 F. (2d) 9, in which latter case, recovery was limited to the insurable interest only of the named insured.

INTENTION OF THE CONTRACTING PARTIES.

Respondent, under this heading, says that the Circuit Court of Appeals as "a matter of fact," found that there could have been no intention on the part of The Board of Education to protect Collieries, when it insured the school building in question. It was not the province of the Circuit Court of Appeals to find "as a matter of fact" what the intention of The Board of Education was, except as the same was expressed by the language used in the contract. Under the federal rules of procedure, this finding of fact, if any such finding was to be made, was peculiarly within the province of the trial court and the trial court found just as emphatically, *as a matter of fact,* that The Board of Education did intend to and did insure the whole title. We submit that the language used in the insurance contract, when given its previously judicial determined meaning, could bear no other construction, than that given it by the trial court. In the so-called finding of fact, the Circuit Court of Appeals embarked upon an inquiry of motive to discover the intention of the parties, rather than to take the plain, unambiguous, and previously determined meaning of the language used to express the intention of the parties. The Circuit Court of Appeals assumed "as a mat-

ter of fact" that The Board of Education would have had to have laid out and expended additional money to cover the whole title to the instant building, over and above the premium charged for insuring its interest in the building alone. *There is absolutely nothing in the record to justify such an assumption.* The matter of premium rates for fire insurance is a matter of statutory regulation in West Virginia. Sections 11 to 20, both inclusive, of Article 4, of Chapter 33, of the Official Code of West Virginia, deal with this whole subject and requires insurers to maintain and be members of a *rating bureau,* which has full power and authority to fix and establish insurance premium rates. Section 13 of said chapter provides that such rating bureaus shall rate risks upon schedules or flat rate. Schedule rating is used in instances of blanket policies covering a number of buildings or a whole industrial or other plant, such as was used in the instant case. Flat rate premiums are prescribed for separate units or separate buildings. Section 17 of said chapter prohibits discrimination by insurers to favored assureds.

Now, there is no proof in this record that the premium rate on the blanket policy, used in the instant case, would be greater when issued in the form it was issued than the premium rate would have been had the contract limited the indemnity to the interest of the named assured alone. There is no foundation for the assumption that this policy cost more in the form in which it was issued than it would have cost in any other form or had the property been insured on a flat rate basis. Nevertheless, the Circuit Court of Appeals assumed that it did. The courts generally are agreed that a presumption must rest upon proven facts by direct evidence and cannot be based upon or inferred from another presumption.[7]

[7] 20 Am. Jur., "Evidence," Sec. 164, p. 168.

If the intention of the instant contract is to be determined on motive, then we submit that the motive to obey the law; the motive to enter into a valid contract, outweighs any want of interest The Board of Education may have had to protect the Collieries Company. The motive was to insure the interest of The Board, but to accomplish this under the peculiar status of the title, to make their own insurance conform with the statute, they intended to, and did, insure the interest of the Collieries Company also and for aught that appears in this record, the insurance may have been cheaper in this form, than in some other basis or form in which it might have been written. Surely, there was compensating advantage to induce The Board of Education to accept this form of contract, else they would not have accepted it. We insist that where the parties were dealing in contemplation of the statute and endeavoring to comply therewith, and in the exercise of a discretion, adopted their own means of compliance, and used language necessary to make a lawful contract, then the language used should be construed that the contract when made would be lawful and the meaning of the words used are the criterion by which to determine the intention as well as the legality of the contract.

This process of reason was recognized and approved in this jurisdiction in the case of Pilgrim Lumber Company v. Federal Insurance Company, 140 F. (2d) 193. There the question before the Court was whether or not it was the intention of the contracting parties to insure two buildings or one building. Each of the buildings required a different rate, as fixed by the Rate Bureau of West Virginia. The Court, in the course of its opinion, said:

> "* * * Section 3376 of the West Virginia Code prohibits unfair discrimination by insurance com-

> panies as to premium rates, and therefore, it would have been unlawful for the insurance companies to have charged different rates on the same building, and if it had been the intention of the parties that the policy, which is the subject matter of this suit, was to cover the two buildings its rate should have been fixed with that in mind. * * * It is reasonable to assume that the insurance companies operating under the law of the state had issued their policies in accordance with the rating bureau's directions and the rates fixed for buildings of this character."

If it is reasonable to assume that the parties intended to obey the rating provisions of this statute, surely it is equally proper to assume that they intended to conform their contract to the standard form of policy prescribed by the same statute.

THE RIGHTS OF THE CLAIMANTS TO THE PROCEEDS ARISING OUT OF A MATURED FIRE INSURANCE CONTRACT ARE NOT NECESSARILY FIXED AT THE TIME OF LOSS.

We are confused as to what meaning is intended by the respondent in the use of the words, "The right of the parties to the proceeds of a fire insurance contract are fixed at the time of the loss," as used in the juxtoposition in which they appear on page 17 of respondent's brief. This statement is not always a true statement of the law. As between the insurance company and the assured, it states an academic principle of law. As between divers claimants of the insurance proceeds, the statement is not correct. The cases are legion in which the proportionate share of the respective claimants of the proceeds are determined after the date of the fire. The matter of adjustment of the proportionate amounts of the gross indemnity paid to the

respective claimants in case of life estate and remaindermen, is always a matter of adjustment after the incident of the fire. A few cases demonstrating the principle are cited in the note.[8] This statement was taken from the syllabus in the case of Crook v. Hartford Fire Insurance Company, 178 S. E. 254.

The language was used in denying one of the assured a recovery under the policy who had an insurable interest at the date of the issuance of the policy, but who had divested himself of that interest prior to the fire. Certainly, in such a case, his rights were fixed as of the date of the fire, because one not having an insurable interest at the date of the fire cannot recover indemnity because he has not been damnified. Counsel for respondent, on page 17 of their brief, cite a great many cases for this broad statement in their brief. We have examined all of these cases, and assert that none of these cases, other than the Crook case, support this broad statement, nor have we found any other cases supporting it. All of the cases cited for the proposition in respondent's brief are cases dealing with insurable interest. They all lay down the sound principle

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[8] Clyburn v. Reynolds, (S.C.) 9 S. E. 973,
Green v. Green, (S.C.) 27 S. E. 952,
Haxall's Ex'ors. v. Shippen, (Va.-1839) 10 Leigh 536, 34 Am. R. 745,
Culbertson v. Cox, 29 Minn. 309, 43 Am. R. 204, 13 N. W. 177,
Brough v. Higgins, 2 Gratt. 408, 19 Va. R. A. 423,
Crisp County Lumber Co. v. Lee Bridges, 187 Ga. 484, 200 S. E. 777,
Clark v. Leverett, 159 Ga. 487, 126 S. E. 258,
Welch v. London Assurance Corp. (Pa.) 151 Pa. St. 607, 25 Atl. 142,
Sampson v. Grogan, (R.I.) 42 Atl. 712, Opinion of the Court, 717.

of law that the assured claiming under a policy of insurance must have an insurable interest as of the date of the fire. The foregoing quoted statement from respondent's brief means just this, and nothing more.

ANALYSIS OF QUESTIONS SUGGESTED ON PAGES 18, 19 AND 20 IN RESPONDENT'S BRIEF.

At pages 18, 19 and 20 of respondent's brief, they quote Section 48, Chapter 45, of Barnes' 1923 Code of West Virginia. Immediately following this quotation, they say:

> "The statute above quoted, fixing the powers of the respondent in its acquisition and disposition of property for school purposes was specifically recognized in the deed to this respondent's predecessor by the grantor stipulating against liability for damages to buildings occasioned by mining (21). The stipulation recognized the respondent's statutory right to sell or remove buildings upon cessation of use for school purposes."

There are two wholly separate and distinct questions, having no logical relation to each other, presented by this quotation, (a) whether or not the deed of August 23, 1924, "recognized respondent's statutory right to sell or remove buildings upon cessation of use for school purposes," and (b) the question as to whether the quoted statute is the true statute "fixing the powers of the respondent in its acquisition and disposition of property for school purposes." We challenge the correctness of both propositions asserted in this quotation. We quote in the note the stipulation referred to in the deed.[9] It requires miraculous

[9] "It being expressly understood and agreed and made a condition hereof that the party of the second part, its successors and assigns, in the event of

reasoning to understand how any person can glean from that stipulation in that deed any recognition of respondent's so-called "statutory right" to sell or remove the buildings upon cessation of the use for school purposes. There is nothing appearing in the deed to suggest the question. The reason for that stipulation in the deed is too patent to require discussion, and the suggestion is too frivilous to require any argument. Indeed, we fail to find any premise for argument on the question suggested by the above quotation from respondent's brief, in relation to that deed. The deed itself is a complete answer to the suggested question.

SECTION 48, OF CHAPTER 45, OF BARNES' 1923 CODE OF WEST VIRGINIA, DOES NOT TRULY PRESENT THE POWERS OF THE BOARD OF EDUCATION IN ITS ACQUISITION AND DISPOSITION OF PROPERTY.

The quoted statute in respondent's brief, Section 48, of Chapter 45, of Barnes' 1923 Code of West Virginia, has nothing at all to do with the matter of acquisition of property for school purposes. The Board of Education of the District of Slab Fork in the County of Raleigh, predecessor of the petitioner in this case, had its corporate existence under Section 46, of Chapter 45, Barnes' 1923 Code of West Virginia, (R. 128) the pertinent provisions of which are as follows:

> damage to the surface of the said lot or parcel of land or to any building or buildings erected thereon occasioned by the removal of the coal, minerals, metals or metallic substances underlying the surface of said land shall have no claim or right of recovery against the party of the first part, its successors or assigns therefor."

> "The board of education of each district shall be a corporation by the name of 'The board of education of the district of ..... in the county of .....,' and as such may sue and be sued, plead and be impleaded, contract and be contracted with: * * *. Said board shall, according to law, hold and dispose of any real estate or personal property belonging to said corporation or its predecessors, or that may hereafter come into its possession. Said board shall receive, hold, and dispose of, according to law, and the intent of the instrument conferring title, any gift, grant, devise or bequest. * * *"

It is apparent and, we think, perfectly clear that there was no limitation upon a district board of education in West Virginia in the acquisiton of school sites, in relation to the nature of estate acquired, whether it be a base fee, a fee simple determinable or a fee simple subject to conditional limitation, and the authorities generally seem to lay down the principle that boards of education or quasi public corporations, acting in their proprietary capacity, acquire property subject to the same principles of common law as applies to other purchasers of property. Section 46, of Chapter 45, of Barnes' 1923 West Virginia Code, conferred this power upon the then district boards of education in broad and comprehensive language. Power was delegated to them to contract and be contracted with in relation to the matters entrusted to them. Immediately following this broad delegation of corporate power to contract, it is provided that the board shall (a) *receive*, (b) *hold*, (c) *dispose of, any gift, grant*, devise or bequest. There is no limitation upon the estate to be contracted for or received or held. It is any gift or any grant.

Furthermore, the provisions of Section 49, of Chapter 45, of Barnes' 1923 West Virginia Code, are equally as broad. "The boards of education of every district * * *

shall *provide by purchase,* condemnation *or otherwise,* such land as may be necessary for school buildings * * * and shall have authority to make the necessary expenditures for the improvement of such lands." (Emphasis our own). This statute enjoins upon the board of education, not only the authority, but the duty, *to provide* such lands as may be necessary for school buildings. The performance of this duty is left to the discretion of the board, a discretion to purchase and determine what estate is necessary. The statute does not restrict the board to the ways and means of *providing* the lands, nor the estate to be acquired in the lands. The word, "purchase," in this statute was intended, of course, to have its usual meaning. Bouvier's Law Dictionary says that the word, "purchase" is "a term including every mode of acquisition of estate known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law." To *provide* a school site by purchase contemplates barter and agreement between the grantor and the grantee and the statute does not say what that agreement shall be, how broad the estate shall be granted or what limitation shall be attached to the estate granted. It is a matter for the board, in the exercise of its discretion, to contract and to be contracted with in the performance of this duty. After the board has thus contracted and provided the lands, by section 46 it is authorized to accept a grant and to hold the lands "according to the intent of the instrument conferring title." These statutes read together, as they must be, confer upon boards of education a wide and broad scope of authority to contract with reference to the purchase of lands. The Supreme Court of West Virginia, in the case of Board of Education

of Elk District v. Harvey,[10] recognized this power and authority and sustained a verbal lease taken by the Board of Education on which it built a building with the public funds of the district, contracting verbally that the building should become the property of the lessor when the same ceased to be used as a school building.

THE DOCTRINE OF ULTRA VIRES IS WITHOUT FOUNDATION IN FACT UNDER THESE STATUTES.

We assume, though respondent does not in its brief so state, that it is intended to raise the question of the authority of The Board of Education to accept the deed of August 23, 1924, with the stipulation for reversion. This contention cannot be sustained. The statute provides that The Board shall make disposition (a) according to law, and (b) according to the intent of the instrument conferring title. This is explicit authority to accept a deed with the reversionary clause. The statute quoted in respondent's brief has no application at all in the matter of disposition of school buildings, unless The Board of Education owned the property in fee simple. The quoted statute received construction by the Supreme Court of West Virginia, in the case of Board of Education of Elk District v. Harvey, and expressly held:

> "Sec. 33, ch. 45, Code 1899, authorizing boards of education to sell school houses that are not needed for public schools, and giving the purchaser right to remove them in certain instances, has no bearing upon this case. The legislature cannot empower a

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[10] Board of Education of Elk District v. Harvey, 70 W. Va. 480, 74 S. E. 507.

board of education to sell property that it does not own. *The statute presupposes title in the board for the public use.*" (Emphasis ours).

DECISIONS OF OHIO AND KENTUCKY NOT APPLICABLE.

We shall not burden the Court with a discussion of the statutes and decisions of Ohio and Kentucky referred to in respondent's brief, in as much as those decisions are influenced by the respective statutes of those states, neither of which are comparable in scope with the Statute of West Virginia. Furthermore, we discussed this whole question in our brief filed in the Circuit Court of Appeals, at pages 25 to 34, both inclusive, and if the Court should be interested in further discussion of the question, we respectfully direct the Court's attention to that brief.

POWER OF THE BOARD OF EDUCATION TO ENTER INTO THE CONTRACT OF INSURANCE.

On page 23 of respondent's brief, they make this statement:

> "The Supreme Court of West Virginia has also specifically decided that the power of a board of education of the state to take out insurance is strictly limited. Assuming that petitioner had a reversionary interest in the building at the time of the loss, yet respondent had no power, if it had desired to do so, to insure such an interest."

For this proposition they cite the case of Board of Education v. Insurance Company, 116 W. Va. 503. The case cited and relied on for the foregoing quotation was a case in which the Board of Education had used public funds to purchase an insurance in which it had no interest whatsoever in the subject matter of the insurance. It was a

case of complete failure of insurable interest. There is no evidence in this case, nor does it anywhere appear in this record that it cost The Board of Education one additional penny to insure the whole title in the instant case more than it would have cost to insure the insurable interest of The Board alone. The whole matter of insurance rates and premiums, as we have hereinbefore demonstrated, is a matter regulated by the rating bureau, established under the Statutes of West Virginia. What those rates were or how they affected the judgment and discretion of The Board of Education in purchasing the insurance, does not appear in this record. In the absence of any showing of misapplication of the public funds in the purchase of this insurance, it will be presumed that there was no misapplication of funds by the public officers who procured the insurance.[11]

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[11] 10 R. C. L., "Evidence," Sec. 27, p. 880,
20 Am. Jur., "Evidence," Sec. 170, p. 174, Sec. 171, p. 177,
The Bank of the United States v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552 (quote from page 554),
Osburn v. Staley, 5 W. Va. 85,
Loan Ass'n. v. Sohn, 54 W. Va. 101, 116, 46 S. E. 222, 228,
Mollohon v. Cavender, 75 W. Va. 36, Opinion of the Court, 42, 83 S. E. 78,
Carmichael v. Reed, 76 W. Va. 672, 680, 86 S. E. 662, 665,
20 Am. Jur., "Evidence," Sec. 177, p. 182,
Sterns Co. v. National Bank of the City of New York, 147 U. S. 91, 37 L. Ed. 93, Syl. 4 and 5,
Larned v. Jenkins, 113 Fed. 634,
43 C. J., "Municipal Corporations," Sec. 2108, p. 1347,
Knox County v. National Bank of City of New York, 147 U. S. 90, 37 L. Ed. 93.

CONCLUSION.

The respondent has given much prominence to the case of New Orleans v. W. R. Grace & Company. They quote from the syllabus of that case and say that the decision of the Circuit Court of Appeals is in harmony with that decision. As we read the Grace case, it presented the simple question of the claimant seeking to recover under the insurance policy, when it was apparent from all the attending circumstances that he had no insurable interest in the subject covered by the policy. We think the case has no application whatsoever. It does recognize the principle on which we base our claim and is of greater authority for our position than the position claimed by the respondent herein.

We respectfully, therefore, urge upon the Court that there is nothing in respondent's brief to warrant a denial of the writ of certiorari prayed for.

Respectfully submitted,

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